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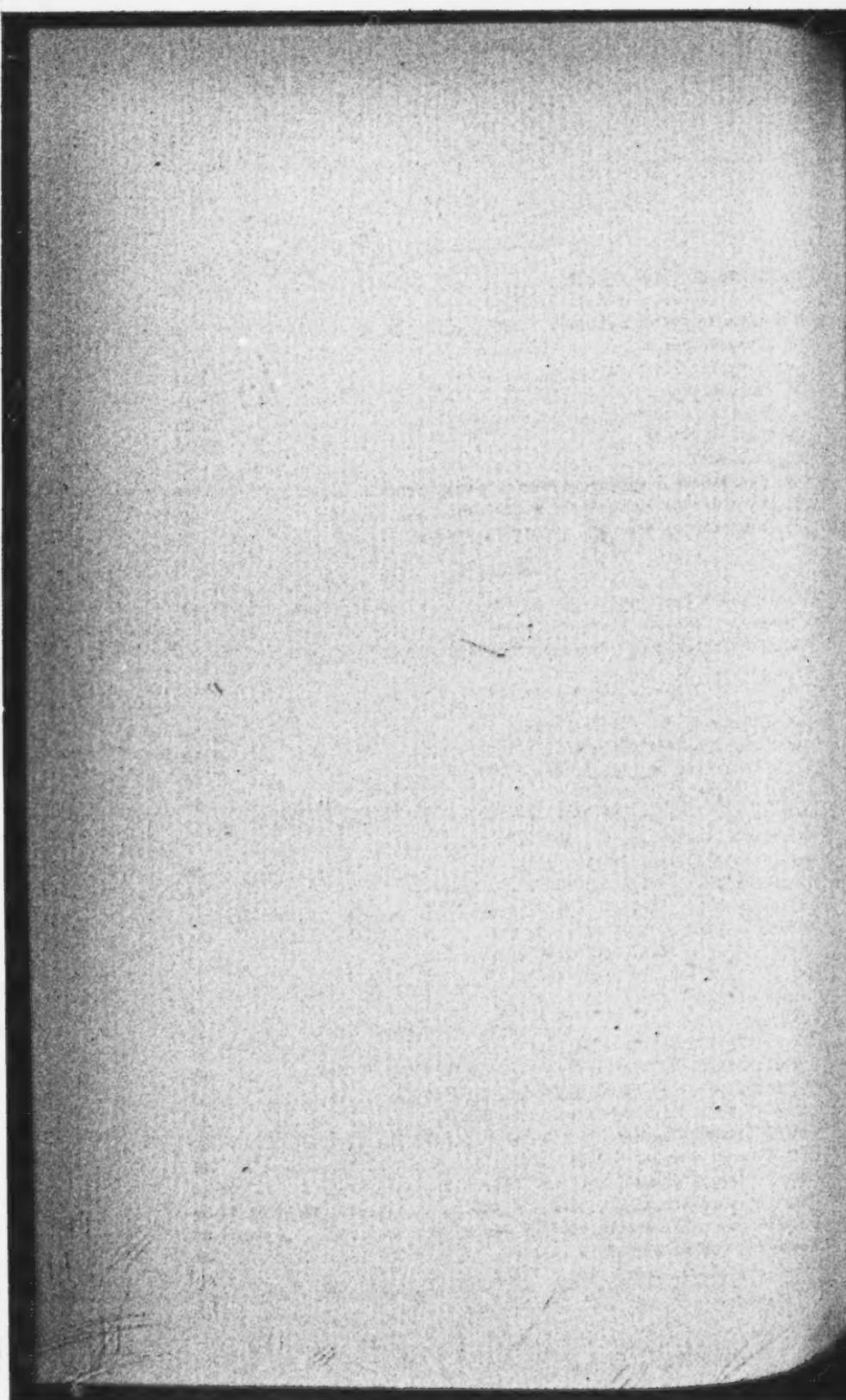
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In the Supreme Court of the United States.

OCTOBER TERM, 1912.

THE NORTHERN PACIFIC RAILWAY COMPANY ET AL., Appellants, } No. 500.
v.
THE UNITED STATES. }

*APPEAL FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT.*

BRIEF FOR THE UNITED STATES.

STATEMENT.

[Except where otherwise indicated, references to boundaries, localities, natural objects, etc., are illustrated by the Barnard map, plaintiff's Exhibit No. 1.]

Viewed from the material side, this suit is essentially and exclusively for the protection of Indian wards of the Government. The United States, as the guardian of the Yakima Bands and having itself nothing material to gain and nothing material to lose, seeks to overcome the destructive consequences of an utterly erroneous and incompetent boundary survey, made without their acquiescence and against

their protest—a survey which has since been set aside by the Land Department and by act of Congress, but the effects of which, if allowed to stand, would rob the Indians of a very large part of their reservation. The Government has no reversionary claim whatever to the lands in dispute, having devoted them entirely to the Indians. Equitably the lands are, and (so far as concerns outsiders) they always have been, the Indians' property. The Government, therefore, in this litigation is seen to occupy purely the position of a guardian and trustee acting in discharge of its trust. Viewing the case from another standpoint, however, the Government has indeed a most serious interest of its own—an interest to keep its solemn treaty promises and to rectify the egregious blunders of its own agents where they operate to deprive helpless owners of their property rights without process of law.

The bill prays the annulment of patents issued May 10, 1895, and January 6, 1896, to the Northern Pacific Railroad Company, and March 5, 1901, and January 4, 1904, to its successor, the Northern Pacific Railway Company, purporting to convey certain described lands which the Government claimed, and both courts below emphatically found, have constituted parts of the Indian reservation for more than half a century. By the act of July 2, 1864 (13 Stat., 365; R., 631), Congress made to the railroad company its immense grant of "public land." So dilatory was that corporation that the map of definite location of its

line proximate to these lands was not filed till June, 1883. (R., 631.) As the act granted only "public land," to which the United States had "full title" and which had not been "reserved, sold, granted, or otherwise appropriated," etc., at the time when the line of the road was definitely fixed and a plat thereof filed with the Land Department, it did not of course affect this Indian reservation, and the Land Department was without jurisdiction to convey any part of the reserved area. The issuance of the patents was due entirely to the erroneous survey which had been made in 1890 and which purported to exclude from the reservation some 357,878 acres really belonging to it, including the tracts described in the patents.

The questions presented below were: First, whether the survey complained of was or was not erroneous. Second, whether, as to the tracts patented more than six years before suit, the statute of limitations (act of March 3, 1891, 26 Stat., 1095, 1099) was applicable. Third, whether the defense of *bona fide* purchase for value could avail to bar relief for the Indians. The first question involves certain questions of fact. Two courts, after careful consideration, have resolved all the above questions against the defendants, finding both the facts and the law as contended for by the Government. Both courts wrote comprehensive opinions reviewing the facts as revealed in the testimony and exhibits. (R., 502, 630.)

The treaty with the Yakimas (12 Stat., 951) was concluded at Camp Stevens, in the Walla Walla Valley, June 9, 1855. It was ratified by the Senate on

March 3, 1859, and proclaimed by the President on April 18, 1850. Isaac I. Stevens, then governor and superintendent of Indian affairs for the Territory of Washington, noted for the United States in the negotiations and signed the treaty as its representative.

The first article is as follows:

ARTICLE 1. The aforesaid confederated tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied and claimed by them, and bounded and described as follows, to wit:

Commencing at Mount Ranier, thence northerly along the main ridge of the Cascade Mountains to the point where the northern tributaries of Lake Che-lan and the southern tributaries of the Methow River have their rise; thence southeasterly on the divide between the waters of Lake Che-lan and the Methow River to the Columbia River; thence, crossing the Columbia on a true east course, to a point whose longitude is one hundred and nineteen degrees and ten minutes ($119^{\circ} 10'$), which two latter lines separate the above confederated tribes and bands from the Okinakanee tribe of Indians; thence in a true south course to the forty-seventh (47) parallel of latitude; thence east on said parallel to the main Palouse River, which two latter lines of boundary separate the above confederated tribes and bands from the Spokanes; thence down the Palouse River to its junction with the Moh-hab-ne-she, or southern tributary of the same; thence, in a southwesterly direction,

to the Snake River, at the mouth of the Tucannon River, separating the above confederated tribes from the Nez Perce Tribe of Indians; thence down the Snake River to its junction with the Columbia River; thence up the Columbia River to the "White banks," below the Priest's Rapids; thence westerly to a lake called "La Lac"; thence southerly to a point on the Yakama River called Toh-mah-luke; thence, in a southwesterly direction, to the Columbia River, at the western extremity of the "Big Island," between the mouths of the Umatilla River and Butler Creek; all which latter boundaries separate the above confederated tribes and bands from the Walla-Walla, Cayuse, and Umatilla Tribes and Bands of Indians; thence down the Columbia River to midway between the mouths of White Salmon and Wind Rivers; thence along the divide between said rivers to the main ridge of the Cascade Mountains; and thence along said ridge to the place of beginning.

The next article is in part as follows:

ARTICLE 2. There is, however, reserved, from the lands above ceded for the use and occupation of the aforesaid confederated tribes and bands of Indians, the tract of land included within the following boundaries, to wit:

Commencing on the Yakama River, at the mouth of the Attah-nam River; thence westerly along said Attah-nam River to the forks; thence along the southern tributary to the Cascade Mountains; thence southerly along the main ridge of said mountains, passing south

and east of Mount Adams, to the spur whence flows the waters of the Klickitat and Pisco Rivers; thence down said spur to the divide between the waters of said rivers; thence along said divide to the divide separating the waters of the Satass River from those flowing into the Columbia River; thence along said divide to the main Yakama, eight miles below the mouth of the Satass River; and thence up the Yakama River to the place of beginning.

All which tract shall be set apart, and, so far as necessary, surveyed and marked out, for the exclusive use and benefit of said confederated tribes and bands of Indians, as an Indian reservation; nor shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent. And the said confederated tribes and bands agree to remove to, and settle upon, the same within one year after the ratification of this treaty. In the meantime it shall be lawful for them to reside upon any ground not in the actual claim and occupation of citizens of the United States; and upon any ground claimed or occupied, if with the permission of the owner or claimant.

Guaranteeing, however, the right to all citizens of the United States to enter upon and occupy as settlers any lands not actually occupied and cultivated by said Indians at this time, and not included in the reservation above named.

Article 3 contained this provision:

The exclusive right of taking fish in all the streams where running through or bordering said reservation is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

Article 6:

The President may, from time to time, at his discretion, cause the whole, or such portions of such reservation as he may think proper, to be surveyed into lots, and assign the same to such individuals or families of the said confederated tribes and bands of Indians as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable.

Stevens was the first governor of Washington. He took charge in September, 1853, when the white population was exceedingly sparse, "and at once set to work to extinguish the Indian titles to land and to survey a route for a railway, which was later to become the Northern Pacific." (Enc. Britt., v. 28, pp. 357, 358.)

On April 30, 1857, he wrote from his headquarters at Olympia to the Commissioner of Indian Affairs an official letter in which he said:

I have, in compliance with the instructions of the department, the honor herewith to transmit a map of the Indian tribes of the Territory of Washington and of that portion of the Territory of Nebraska lying to the eastward as far as the mouth of the Yellowstone. I can vouch for the general accuracy of the map and of the Indian statistics given in it. (R., 316.)

This map is plaintiff's Exhibit No. 6, and appears in volume 2 of the record, page 582. It covers a wide territory and shows the boundaries of many Indian cessions and reservations, along with topographical and geographical features. It purports to mark the outline of the large area ceded by the Yakima treaty, and also within it, the area which the treaty set apart for the Indians. Appended to this brief is a reproduction of so much of this map as is regarded as material to the present controversy. Glancing at this the court will observe that the Cascade Mountains are represented (with substantial accuracy) as extending across the territory from south to north, from Oregon to the British possessions, and that the western boundary of the ceded area coincides with the axis of the range. Mount Adams is represented as rising from a spur extending from this axis or main range in a southeasterly direction. The Klickitat River is marked as head-

ing *west of this spur*, and as flowing thence south-easterly on the *westerly side of the spur and of Mount Adams*, and between them and the main ridge, to a confluence with the Wa-wum-chee River quite south of the region now in question.¹ The divide between the Satass and Columbia Rivers is indicated as lying considerably farther north than it is now known to be, with reference to Mount Adams. The south fork of the Attah-nam is made to reach the summit of the Cascades. The reservation lines are marked as extending up that stream *to the main ridge, far to the west of Mount Adams*; thence for some distance south on the ridge; thence southeasterly to the divide between the Satass and Columbia. The tract as thus delimited, is relatively narrow from north to south, due to a misunderstanding of the true situation of the Satass-Columbia divide (the draftsman placing it much too far to the north—see Barnard map), and due to the failure to bring the west line down the main ridge to the southeasterly slope of Mount Adams, as required by the treaty. Another old map, called the "White Swan map" (plaintiff's Exhibit 3, R. II, 585), was found among the archives

¹ The blue print of the Stevens map contained in the transcript differs from the original and from the certified copy used in evidence, in exhibiting the Klickitat River as heading *east* of this spur and passing through it before traversing its westerly base. We are at a loss to understand this peculiarity of the transcript copy. The copy in our appendix was printed from a fresh tracing from the original, in the Indian Office, and accords with the original quite accurately. If desired by the court, a photographic copy will be certified and filed.

of the Yakima Agency. It is substantially a reproduction of a portion of the Stevens map, including the reservation and some adjacent territory. (R., 134.)

Under date of September 19, 1861, William W. Miller, as superintendent of Indian affairs for the Territory of Washington, entered into a contract with Thomas F. Berry and James Lodge, surveyors, for the survey and marking of "all the boundaries of the Indian reservations east of the Cascade Mountains that are necessary to be surveyed and marked." Natural boundaries, "such as rivers, ranges of mountains, and so forth," were not to be surveyed. (R., 322.) By a letter dated September 10, 1861 (R., 318), the superintendent, Miller, referring to this contract, instructed Berry and Lodge to commence with the Yakima Reservation. He stated that by reference to the treaty it appeared only necessary to survey and mark the *southern* boundary, as the others were natural boundaries and sufficiently unmistakable for all practical purposes; and he directed the surveyors to proceed from the Yakima River westerly along the divide between the Satass and Columbia Rivers and along the divide between the Klickitat and Pisco Rivers until they arrived at the source of either the latter or the former, where they should terminate the survey. He added:

Should you find before arriving at the source of either of these rivers that the "divide" has assumed the character of a perfect

natural boundary, you will terminate your survey at the point where this description of boundary is attained.

It is important to note, first, that the superintendent regarded the other boundaries, namely, the Yakima and Attah-nam Rivers and the *main ridge of the Cascades*, as too definite and certain to require any survey, and conjoined the Klickitat-Pisco divide with the divide between the Satass and Columbia as factors of the *southern* boundary presumably indefinite and calling for artificial definition.

Berry and Lodge made a survey and returned the plat and field notes, as their contract required. The plat (R., 580) indicates that the south boundary was run to a point on or near the Klickitat River, and again lays down that stream as originating *on the south slope of Mount Adams* and flowing thence southeasterly. It also shows a tributary of the Pisco as heading near the east side of the mountain and a spur of hills projecting down between them southeasterly to meet the ridge constituting the Satass-Columbia divide. (See also record, 472.)

The original field notes of this survey have been discovered in the Indian Office since this case was heard by the Court of Appeals and are printed in full as an appendix to this brief, a certified copy having been filed with the clerk of this court. According to these, the line, as surveyed westerly from the Yakima River, was marked by posts set in mounds, often of stone, and sometimes with trenches and pits. They note the crossing of the "canon road

from Fort Simcoe to the town of Dallas [which] bears N. and S.;" also farther west the "military road from Fort Simcoe to the town of Dallas;" also, still farther west, the "road from Fort Simcoe to town of Dallas [which] bears N. and S." The locations of these three road crossings are indicated on the plat. The terminating monument is described as follows:

Set post in mound with trench and pits 10.00 chains east of a bald butte (the foot of the butte) and close the survey—

which indicates that the surveyors did not come down to the Klickitat River, but stopped at the easterly base of a butte on its northerly bank.

This was the first survey of which there is any record evidence. There is other evidence, however, showing that all the boundaries had been roughly traced with the eye and that an attempt had been made to mark the southern line before the work of Berry and Lodge was done. "Stick Joe," an old Indian (dead when the depositions were taken, R., 151), told the witness Barnard in 1898, when the latter was making his survey, that about the year 1860 he accompanied a party of Government agents along a portion of the southern boundary. They left the old military wagon road at mile post 29 (of that road) where the road crossed the line of the reservation, and proceeded on that line, following a well-defined ridge, to Grayback Peak, on the summit of which a marked wooden post, set in the ground, was found. There one of the party, a surveyor or

Government agent, took out a telescope or some surveying instrument, and, sighting toward Mount Adams, pointed out a conical hump on the southeast slope and told the party that the line now went straight to that place. The party tried to proceed in that direction, but was obliged to turn back because of the precipitousness of the mountain side. (R., 81, 125.)

Chief Spencer, on the same occasion, told Barnard that Governor Geary, who succeeded Governor Stevens, had described the north and west boundaries as extending up the Attah-nam River from its mouth to the mouth of the south fork; thence up the south fork to its head; thence directly west to a high point, "just this side of Goat Rocks"; thence to a conical hump on the southeast side of Mount Adams. (R., 82.) Also, that he had accompanied "Mr. Thompson," Dr. Nowden, Indian agent at the time, and a clerk from the Warm Springs Agency over a portion of the southern boundary and that they blazed some trees at the junction of the Goldendale wagon road and the old Indian trail from Yakima—a place supposed to be on the line from Grayback Peak to the hump on Mount Adams. (R., 82, 83.) These statements were substantially repeated to Barnard by the two old Indians in 1899, Spencer then giving the name "Townsend" instead of "Thompson" and mentioning a Mr. Mason in connection with the trip. (R., 83.) Townsend was agent at the White Salmon Agency in 1858, and Mason

was Governor Stevens' secretary and acting governor of the Territory in 1859. (Ib.) In his deposition (R., 144 *et seq.*) Chief Spencer, after saying that Governor Stevens had assured him that the reservation would be marked out, describes an occasion, about two years after the treaty (R., 151), when three men, one of whom was "Townsend," the first agent appointed by Governor Stevens (R., 150), took him to the southwest corner, at the junction of the old Indian trail and the Goldendale Road, "cut out a notch on a tree," made a pile of rocks there, and, pointing to Mount Adams and Grayback, told him that the lines would run to them from that corner, and that Goat Rocks would be the northwest corner. The place thus indicated as the southwest corner falls some two miles south of a direct line from Grayback to the "hump." (R., 86.) The chief's statement regarding the blaze was strikingly corroborated by Barnard, who discovered a *blaze forty years old* upon one of two large pines there, both of which had been anciently blazed. (R., 79.) Barnard also found "a line of blazes about forty years old" extending from the vicinity of mile post 29 of the old military road eastward along the ridge to mile post 51 of the Schwartz survey. (R., 80.) To the same effect is the testimony of the Indians Olney (R., 161) and Abe Lincoln (R., 178). The court will note the great significance of these ancient blazes, extending westwardly along the ridge from mile post 51 to Grayback and of the coeval blaze on

the Goldendale Road, approximately in the line between Grayback and Mount Adams. Their existence is explicable upon no other theory than that they were made for the purpose of marking the reservation boundary. (R., 89.)

Accompanying the report of the surveyor general of Washington for the year 1865 is a map of that Territory, prepared by him officially, which also shows the Klickitat and Pisco Rivers as heading from Mount Adams, *the former on the west* and the latter on the east side. As this report and map constitute public documents which have long been printed and published pursuant to law, we assume that the court will be at liberty to refer to them, though they were not brought to the attention of the courts below. (Report of Commissioner of General Land Office, 1866, p. 137, and map.) So much of the map as covers the region now in question will be found copied in the appendix of this brief.

It appears that in 1886 a survey of a portion of the southern boundary, running $47\frac{1}{2}$ miles westwardly from the Yakima River, was made by one Harry J. Clark (R., 487, 470, 475), under the auspices of the Indian service. This did not reach the region now in controversy, but ended upon the Columbia-Satass divide.

We come now to the erroneous survey made by Schwartz in 1890—and, first, as to the occasion of it. As appears by a letter from the Commissioner of Indian Affairs to the Secretary of the Interior (R., 468), Agent Stobles (R., 483), of the Yakima Agency,

had prior to October 5, 1889, repeatedly recommended the survey of the southern and western boundaries, and by a letter of that date the commissioner had called upon him for a report of his reasons. The reply came from his successor, Priestly, who reported among other things that serious disputes concerning the location of the south boundary had resulted from the incursions of stock owned by white people, and that the monuments supposed to have been erected by Clark for 47½ miles were difficult or impossible to find. (R., 483, 487.) Regarding the western boundary he said (R., 483):

The western boundary has, I believe, never been surveyed. It is described in the treaty as "along the main ridge of the Cascade Mountains, south and east of Mount Adams to the spur whence flows the waters of the Klickitat and Pisco Rivers." Which is the "main ridge" of the Cascade Mountains here referred to is a subject of disagreement. Indians claim the "main ridge" extends to the base of Mount Adams on the south and east. While white men with diverse interests claim the "main ridge" referred to to be farther east. No river known as the Pisco is shown on any map, and I have found no person, white or Indian, who has knowledge of any river of that name.

In his letter to the Secretary recommending a new survey, the commissioner says (R., 471):

The line to be rerun commences at a point on the main Yakama eight miles below the mouth of the Satass River and extends along

the divide separating the waters of the Satass from those flowing into the Columbia, a distance of $47\frac{1}{2}$ miles. From this point the line to be surveyed extends along said divide to the divide between the waters of the Klickitat and Pisco Rivers; thence along said divide to the spur whence flow the waters of said rivers; thence up said spur to the main ridge of the Cascade Mountains; thence northerly along said ridge, passing south and east of Mount Adams, to the southern tributary of the Attah-nam River.

The whole distance is estimated about 115 miles.

In his letter of December 3, 1889, Agent Priestly states that no river known as the Pisco is shown on any map, and that he has found no person, white or Indian, who has knowledge of any river of that name.

By comparing the diagram of a survey of the Yakama Reserve by Berry & Lodge, made in 1861, on file in this office, with the Land Office map of 1887, it is found that the river designated as the Toppenish on the map of 1887 is the Pisco referred to in the treaty. It is delineated on the diagram as rising about six miles nearly due east of Mount Adams and a very short distance north of second standard parallel.

I have the honor to recommend that the Commissioner of the General Land Office be directed to cause the south and west boundaries of the Yakama Reservation, *as above indicated*, to be resurveyed and surveyed,

the line to be marked at every half mile, where practicable, with conspicuous and durable monuments.

The influence of the Berry and Lodge map is manifest here.

May 20, 1890, pursuant to instructions from the Secretary (R., 466), the Commissioner of the General Land Office authorized the surveyor general to contract with a deputy surveyor for the resurvey of the south and west boundaries "as more particularly detailed in the letter of the Commissioner of Indian Affairs, dated May 9, 1890." (R., 474.)

The instructions given to the deputy by the surveyor general (R., 325) have been fully noticed by the courts below (R., 637.) Schwartz was told to begin at the $47\frac{1}{2}$ milepost of the south boundary (established by Clark) and extend the line along the Satass-Columbia divide to the divide between the Klickitat and Pisco; thence along that divide to "the spur whence flow the waters of said rivers"; thence up said spur to "*the main ridge of the Cascade mountains*"; thence "*northerly along said ridge, passing south and east of Mount Adams*" to the southern tributary of the Attah-nam River," etc. (R., 328.) He was also told to confer with the agent in charge of the Yakima Agency, and with other white persons and Indians familiar with the country, and obtain all information possible that would tend to a proper location and establishment of the boundary. (R., 329.)

There is no dispute about the correctness of the Schwartz survey where it follows the Columbia-Satass divide to the fifty-first mile. But the evidence shows conclusively that from that point a defined ridge extends westerly to Grayback Peak, the same being the ridge along which the line of ancient blazes mentioned above was proved to exist, and the ridge which has always been claimed by the Indians to constitute a part of their south boundary. (Barnard, R., 80, 81, 86, 103, 105; Olney, R., 158, 161, 163; Lincoln, 177, 178; Slyvester, R., 197; Schwartz, 215, 227, 241, 242.) It crosses the Klickitat, that river making a deep cut or gap in it (Slyvester, 197), and continues southwesterly till it joins Mount Adams and the main range. (Ib., 201.) In other words, the ridge west from Grayback projects into, or is met by, spurs coming down on the east and southeast sides of Adams. (See Schwartz, 228, 239, 240, 241, 242.) Schwartz did not follow this ridge toward Mount Grayback. He did not explore it. Indeed, he seems not to have paid any serious attention to the claim of the Indians concerning it, which he knew. His report on the subject is as follows (R., 464):

Up to the fifty-first mile corner there is no disagreement whatever regarding the location of the line, that I could learn. The line follows the top of a well-defined ridge acknowledged to be the true divide by both the whites and Indians with whom I conversed. The line in dispute is from the fifty-first mile "onward"

in a northerly direction. The Indians claim that the line passes along the top of a low ridge of hills bearing in a southwesterly direction and terminates at the Big Klickitat River and that this should be a continuation of their southern boundary; upon the western end of said ridge there is a round hill called Gray Back Mountain.

Thence it is claimed by the Indians the line bears in a northwesterly direction crossing the Klickitat River to the base of Mount Adams.

From a consultation with Mr. Stabler, the United States Indian agent at Fort Simcoe and from our understanding of the description of this boundary as given in the treaty of June, 1855 (U. S. Statutes, vol. [12, p. 951], 961), I adopt this as the intended course and continue the line along top of the divide which bears in a northwesterly direction between the waters of the Satas and those flowing into the Klickitat River.

The course actually adopted entirely ignores the Indians' claim, the ancient maps, and the most prominent calls of the treaty, namely, the main ridge of the Cascades and Mount Adams. That the divide between the Klickitat and Pisco (as now known) is not the main ridge is conceded. Schwartz says so in his report and deposition. (R., 465, 232.) Noel, the inspector who passed upon the survey, says the same. (R., 260.) The fact is brought out in the testimony repeatedly, and both lower courts have so decided. Schwartz, however, followed it northwestwardly from his fifty-first mile corner in preference to the

ridge leading to Grayback, which he saw (R., 215, 228), and ignored Mount Adams and the main ridge of the Cascades altogether, for no other reason than because, to do otherwise, would have meant crossing the Klickitat River (R., 465). We quote from his deposition (R., 235):

Q. You did not extend or run your line along the main ridge of the Cascade Mountains?

A. No, because I could not do it without crossing the Klickitat River and the treaty did not call for that.

He testified that he did not consider the Grayback Ridge at all, because it terminates in the Klickitat River and the treaty called for a continuous ridge from the head of the Attah-nam. (R., 225.) Schwartz held no standing employment under the Government. He was a private surveyor, designated as a deputy surveyor and thus authorized to take Government work by special contract. (R., 233.)

The survey was examined and approved by one Noel. His report (R., 490) and testimony (R., 247), however, demonstrate that his inquiry did not go beyond the inquiry of Schwartz, and that his approval was determined by the same misconception of duty which afflicted Schwartz's judgment. While admitting that he could see all of the peaks of the Cascades (R., 264) and would not mistake the Schwartz Ridge for the main ridge of those mountains (R., 259), he testified that he naturally accepted the former, as he "had been told to find the divide" between the

waters of the Klickitat and Pisco (R., 259), and that he had been "instructed to see whether he (Schwartz) followed that divide" (R., 263).

The work was formally accepted by the Commissioner of the General Land Office on October 21, 1891 (R., 496). There was no contest or hearing of any kind. Nowhere do we find evidence of an effort at once intelligent and conscientious to construe the treaty in the light of the topographical facts as they were understood when the treaty was made; nowhere any endeavor to ascertain the basis of the Indians' claim; nowhere an inquiry into, much less any knowledge of, what was done to give it practical expression. The inference is conclusive that the early markings were absolutely unknown to the persons who engaged in this proceeding. Their eyes, apparently, were blind to the fact that at the time of the treaty, and for some years afterward, the Klickitat River, or some stream that then bore the name, was believed to flow from the *west* side of Mount Adams. Actually, if not theoretically, the Schwartz survey was an *ex parte* matter, so far as the Indians were concerned. If it had run counter to the claims of white people, there would have been protests and hearings, the Commissioner and the Secretary of the Interior would have been enlightened, and the mistake would have been rectified. But, the claimants being Indians, there was nothing of the sort. Their general claim was known to their agent and the surveyor, but not inquired into. They continued to

complain, but the agent, who had failed to represent them when the error arose, remained complaisant while it was being consummated, until another agent took his place, when the protests fell on more intelligent, and possibly more conscientious, ears.

The evidence fully bears out the findings of the lower courts, that the Indians always claimed the larger boundaries. The trial court says (R., 525):

No other conclusion can be reached but that the Indians, whenever the question arose, always claimed the main ridge as forming the western boundary. * * * No act or admission of the Yakima Nation of Indians, or any of the tribes belonging to it, or of any individual member, is shown from which the conclusion can be reached that the Indians ever conceded the Schwartz line or admitted anything short of a line running to the main ridge of the mountains.

Indeed, there can be no sort of question that the claims and complaints of the Indians in regard to this matter were continuous and unabated both before and after the Schwartz survey. (R., 182 et seq.; R., 192.) It was not until May 10, 1895, that the earliest of the patents involved in this litigation was issued. (R., 11.) The Indian Commissioner's letter of April 12, 1898, shows that the complaints and wrongs of the Indians had been the occasion of an inspector's report in September, 1897 (R., 133), and the Commissioner there said that he was fully convinced from the reports and statements made to his office that the

Yakima Indians would not rest content until the boundary matter had been satisfactorily settled.

The present and accepted survey was begun by Mr. Barnard, then a topographer and now a geographer, of the United States Geological Survey, in the fall of 1898, and was completed by him in the fall of 1899 (R., 121). It was approved and submitted to the Secretary of the Interior by the Geographer and the Director of the Geological Survey January 16, 1900 (R., 120, 121). The Secretary approved it April 7, 1900 (R., 133), and submitted it to Congress on April 20 of that year (R., 109). And by the act of December 21, 1904 (33 Stat., 595), Congress branded the Schwartz survey as erroneous and accepted and confirmed the survey as made by Barnard.

The statutory provision is as follows:

That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell or dispose of unallotted lands embraced in the Yakima Indian Reservation proper, in the State of Washington, set aside and established by treaty with the Yakima Nation of Indians, dated June eighth, eighteen hundred and fifty-five: *Provided*, That the claim of said Indians to the tract of land adjoining their present reservation on the west, excluded by erroneous boundary survey and containing approximately two hundred and ninety-three thousand eight hundred and thirty-seven acres, according to the findings, after examination, of Mr. E. C. Barnard, topographer of the Geological Survey, ap-

proved by the Secretary of the Interior April seventh, nineteen hundred, is hereby recognized, and the said tract shall be regarded as a part of the Yakima Indian Reservation for the purposes of this act: *Provided further*, That where valid rights have been acquired prior to March fifth, nineteen hundred and four, to lands within said tract by *bona fide* settlers or purchasers under the public-land laws, such rights shall not be abridged, and any claim of said Indians to these lands is hereby declared to be fully compensated for by the expenditure of money heretofore made for their benefit and in the construction of irrigation works on the Yakima Indian Reservation.

The work of Barnard and the evidence and conclusions upon which his results were based are so clearly explained in his official report (R., 121) and his testimony (R., 71 et seq.), and have been so fully considered in their opinions by both courts below, that no further review of them is here expedient. He ran a straight line westerly from the head of the south fork of the Attah-nam River to a prominent peak on the main range, which he called "Spencer Point"; another straight line southwesterly from there to the conspicuous spur or "hump" on the east slope of Mount Adams; another straight line from the "hump" to Grayback Peak; and closed the survey by following the ridge from Grayback Peak to Schwartz's fifty-first milepost. This employment of straight lines was actuated by the information given him by the old Indians, and the survey in that form

was adopted by Congress. Barnard, however, suggested as a logical alternative, that the line from the head of the Attah-nam should follow the ridge of the Cascade Mountains leading thence to the main ridge around the headwaters of the Klickitat, and proceed thence southerly along the main divide around or over Mount Adams to the "hump." The Indians would have gained by this, and would have gained still more if the line had been carried southeasterly down the spurs of Mount Adams to and thence along the ridge which extends southwesterly from Grayback.

Before concluding this statement, we should add that all of the matters *in pais* upon which the Government laid stress to support its contentions have been found and accepted as true by both of the tribunals through which this litigation has passed. Those courts accepted the practically uncontradicted evidence of the Indian witnesses regarding the nature, the iteration, and the reiteration of their claims of boundary; regarding the lay of the lines as understood, not only by these tribesmen, but by the officials of the Government in the very early days before disputes were possible; regarding the pointing out of those lines and the marking of them by the blazing of trees in places consistent with the Barnard survey but wholly inconsistent with the survey of Schwartz. Other corroborative facts, such as the collection by Indian Agent Wilbur of rents from white people on account of the pasturing of their

stock within the disputed area and the annually recurring habit of the Indians of hunting and collecting berries on the slopes of the main range far to the west of the inferior ridge selected by Schwartz for the western boundary, were also accepted by the courts below. And what is most important, those courts found from the evidence that it was the intention of the treaty makers to bound the reservation on the west by the main ridge of the Cascade Mountains as it is known to be to-day, and must have been known then, and to carry that boundary to a prominent spur of Mount Adams located on its southeasterly side, and thence down the slope of that mountain to Mount Graybaek, there to connect with the well-defined ridge (concerning the existence of which there is no dispute) extending from Grayback to the 51st milepost at the terminus of the Columbia-Satass Divide—and further, in corroboration of this intention, that the Klickitat River was then supposed, as the early maps evince, to originate on the west of Mount Adams and the Piseo on the east thereof; which fact affords, in connection with the other evidence, a complete explanation of the apparent inconsistency of the treaty description.

Some 972.72 acres of the land involved, namely, all of section 1, T. 9 N., R. 13 E., and portions of sections 11 and 13 of that township fall within the reservation even as surveyed by Schwartz. (See plat, R., 617.)

ARGUMENT.

I.

The Schwartz survey was erroneous, and the Barnard survey includes no land to which the Indians were not entitled by the treaty.

In the face of the treaty, and in the light of the facts as established by the evidence *and as found by both courts below*, there is no possible way of sustaining the survey made by Schwartz.

The calls of the treaty are:

1. Along the Attah-nam River from the Yakima westerly to the forks.
2. Along the southern tributary of the Attah-nam from the forks to the Cascade Mountains.
3. Southerly along the *main ridge* of the Cascade Mountains, passing south and east of Mount Adams, to the spur whence flow the waters of the Klickitat and Pisco Rivers.
4. Down the said spur to the divide between the waters of the Klickitat and Pisco Rivers.
5. Along the said divide to the divide separating the waters of the Satass River from those flowing into the Columbia.
6. Along the last-mentioned divide to the Yakima River, at a point eight miles below the mouth of the Satass.
7. Thence up the Yakima to the mouth of the Attah-nam, the place of beginning.

There is no doubt concerning the first and last calls. Neither is there any uncertainty about the

location of the second and sixth—the southern tributary of the Attah-nam and the divide between the Satass and Columbia. We have, then, the entire eastern boundary and the major portions of the northern and southerly boundaries settled to begin with.

The second call instructs us to go up the southern tributary of the Attah-nam to the Cascade Mountains and the third tells us to proceed thence southerly along the *main ridge* of those mountains beyond Mount Adams.

Once concede that the "main ridge" of the treaty is the main ridge as it is known to be to-day, and these instructions need cause no embarrassment whatever. The gap of 20 miles now demonstrated to exist between that ridge and the head of the stream is easily explained by the fact that the stream was believed to extend to the ridge (see Stevens's map), and it may readily be bridged, either by a straight line, as was actually done, or, perhaps more logically, by pursuing the secondary ridge or spur of the *Cascade Mountains*, upon which the stream actually rises, northwesterly and westerly, until that ridge joins the main ridge. As the choice between these methods could not affect the defendants one way or the other, it is unnecessary to consider which would have been the more correct.

Now, we assert with perfect confidence that the "main ridge" intended by the third call of the description is the main ridge or divide of the Cascade Mountains as it was fashioned by the hand of nature

and actually exists. The Cascades form a mighty sierra reaching from the Columbia River to the British possessions and bisecting the State of Washington from north to south. The ridge of those mountains—that is, the sinuous but practically determinable line separating the waters flowing from them eastwardly from those flowing toward the west—affords a most convenient natural boundary for large bodies of land. Such boundaries have been employed through all history; and this particular one, as a glance at any modern map of Washington will show, has been availed of by the State for the purpose of marking off the counties lying east from those lying west of the range. We need not, then, be surprised to find (though the fact seems heretofore to have eluded notice in this case) that this great and convenient line of nature was adopted by the Government and the Indians in the treaty of 1855 as the western boundary (for the most part) of the immense area thereby ceded to the United States. Article 1 of the treaty described the tract thus relinquished as—

Commencing at Mount Ranier (sic), thence northerly *along the main ridge of the Cascade Mountains* to the point where the northern tributaries of Lake Che-lan, etc. [omitting the intermediate calls as immaterial to the present question]; thence down the Columbia River to midway between the mouths of the White Salmon and Wind Rivers to *the main ridge of the Cascade Mountains*; thence along *said ridge* to the place of beginning.

The Indians were not deeding acres or townships; they were yielding a principality over which, as a nation, they had been claiming ownership and exercising a *quasi* sovereign power. They were giving up what was *their* territory, as distinct from the territories claimed in that great region by the other bands or nations of their race—a territory comprised between the courses of great rivers and the reach of a mighty sierra. It was natural, usual, inevitable that such a territory should, by occupancy, tradition, and common consent have come to be separated from other like territories by the greater boundaries of nature, which alone befitted its vast dimensions. They referred to the main ridge of these mountains as one continuous, ascertainable thing. The inferior ridges or spurs, connected with but leading *away from* the main ridge, could not have entered into their calculations as forming any part of the boundary. Such a thing would be impossible and absurd.

As will be seen upon consulting any modern map of Washington, such as the map issued by the General Land Office, this main ridge of the Cascades passes through the Goat Rocks referred to in the evidence; thence southerly over *Mount Adams*; thence southwesterly and southerly to the Columbia; and Mount Rainier is situate considerably to the west of it, while the Wind and White Salmon Rivers lie both to the east of it. On the Stevens map the west boundary of the Yakima cession is plainly marked as running from the Columbia between the Wind and White

ing the ridge of the mountains through Mount Rainier to the northwest corner of the ceded tract. This line is intended unquestionably to mark the ridge which the contracting parties had in mind when they agreed upon the bounds of the ceded land. The map in this regard is substantially correct except in locating Mount Adams on a connecting ridge or spur extending southeast, which was a mistake, and in showing Mount Rainier as though it were (as Mount Adams turns out really to be) on the very line of the divide. The Stevens map was not based upon an actual survey. It was an approximation, designed to show in a broad way the results of the various Indian treaties. Whatever may be said of its accuracy in the smaller details (where it would necessarily be faulty), it is trustworthy where it naturally would be expected to be so, in indicating, rather than in defining, the lay of the grander boundaries, and in this regard it is evidence of the most satisfactory kind.

There could not be two "main ridges" of the Cascade Mountains. The treaty affords not even a suggestion that different ridges were in mind. The conclusion, therefore, is inevitable that the ridge intended to be designated by that expression as used in article 1 is the same as the ridge intended to be designated by the identical expression occurring in the second article a very few lines below.

All the maps and all the depositions relating to this subject agree absolutely that the "ridge" of the defense (which we will call "the Schwartz Ridge")

Salmon Rivers to the mountains, and thence follows wholly east of the main ridge or divide of the Cascade Mountains. It is conceded that the main ridge extends between Mount Adams and the Goat Rocks (as shown on the modern maps of the State), exactly where Barnard located it, and 20 miles or more to the west of the secondary and wholly inferior divide (the "Schwartz Ridge") upon which the defendants rest their case. If the Schwartz Ridge were taken as a portion of the main ridge of the treaty cession, the southwestern boundary of the ceded territory would be utterly dislocated. But, if it can not be taken as a part of that boundary, it can not be taken as the western boundary of the reservation, since the latter was not distinct from the former, but a part of it—a fact placed out of question by the treaty itself and the strong corroboration afforded by the identification of these boundaries in the Stevens map.

The defendants' counsel close their eyes entirely to the first article of the treaty, and would have the court believe that the eyes of the parties who made it were in like manner blinded. In effect, the court is requested by them to assume that those parties, when they came to define the *reservation*, directed their minds not to the main ridge "as now known"—that is, not to the main ridge which they had just selected as the western boundary of the cession, and with which their attention was most seriously, indeed, primarily, engaged—but upon some other ridge, namely, the Schwartz Ridge, which would seem prominent, because near, to one viewing it from

the valleys on its eastern side. This line of argument, if such it may be regarded, calls for no reply. We are confident that there will be found in the record not a syllable of testimony, not even the slightest basis for the flimsiest inference, that the Schwartz Ridge was ever spoken or thought of by anybody as the main ridge of the Cascade Mountains. The only possible justification for adopting the Schwartz Ridge as any part of the boundary lies in the fact that upon it lies the divide between the Klickitat and Pisco Rivers, as they are now known. Herein lay the solitary argument which Schwartz and Noel were able to advance in excuse of their work. The treaty description (reading the calls in reverse order) required them, they said, to follow up that divide upon leaving the divide between the Satass and Columbia. This assumes, of course, that the divide they followed—on the Schwartz Ridge—is the object intended to be indicated by the fourth call; for, if it is not the thing so intended, it has no significance whatever. But this assumption operates at once and irremediably to destroy the fanciful theory that this Klickitat-Pisco divide, or Schwartz Ridge, is itself the “main ridge” of the Cascade Mountains, since the third call directs that the latter be followed southerly, passing south and east of Mount Adams to “the spur whence flow the waters of the Klickitat and Pisco Rivers,” and the fourth call requires us to follow down that spur, all *before* we come to the divide between the waters of those rivers. Thus it will be seen that counsel’s theory reduces the second,

third, and fourth calls of the description to one and the same thing, which is a *reductio ad absurdum* of the theory itself.

Having thus identified with certainty the "main ridge," obedience to the third call commands us to follow it to some spur south and east of Mount Adams, either by going over the top or by traversing the slopes of that mountain. We will not attempt to refine here. What is essential is that some point south and east of it be attained by following, as closely as possible, the divide of which it forms a part. The spur is further described as "the spur whence flows the waters of the Klickitat and Pisco Rivers." This is *falsa demonstratio*. That those who framed the description, in their ignorance of the lesser topographical features, supposed that there was a spur extending southeast from Mount Adams, with a stream called the "Klickitat" flowing along the west of it and a stream called the "Pisco" heading on its easterly side, is evidenced not only by the early maps but most convincingly by the description itself. That some extension of Mount Adams was intended as the natural object forming the terminus of this call is clear. That no part of the Schwartz Ridge could have been intended is certain beyond peradventure. The Schwartz Ridge lies 20 miles east of the main ridge and of Mount Adams; there is no spur at its head from which the Klickitat and Pisco rise; and it would be a physical impossibility to insert it in the boundary without leaving out entirely the prin-

cial objects called for by the description, namely, the main ridge and Mount Adams.

The importance which the Schwartz ridge seems to possess, as the divide between the Klickitat and Pisco Rivers, is unreal and fictitious, since it is plainly not the divide to which the makers of the treaty intended to refer in the fourth and fifth calls of the description. The authors of the early maps regarded the Klickitat as a stream flowing west of Mount Adams and west of a spur projecting southeasterly therefrom. It is so marked on the Stevens and White Swan maps, on the Berry and Lodge map of 1861, and on the Surveyor General's map of 1865. They thought the Attahnam began on the main range, 20 miles west of where it actually does. Those who wrote the description in the treaty were under the same delusions. They were ignorant of the upper waters of the Attahnam, the Pisco, and the Klickitat. It is easy to understand how, deceived by distant appearances or misinterpreted information, they falsely conceived the last two streams as both heading from some spur on the southeastern side of the great mountain. There is actually a spur which (in the words of the trial court, R., 521) "Leads down from Mount Adams toward the divide which separates the waters of the Satass from those flowing into the Columbia." "It was assumed, apparently, that this ridge divided the waters of the Klickitat from those of the Pisco." (Ib.) As a matter of fact the Klickitat cuts through this ridge in a narrow and precipi-

tous gorge or canyon, the existence of which might easily be concealed to the distant viewer.

Whether the maker of the Stevens map was guided by the same misinformation which phrased the description or played merely the part of an interpreter of the description itself, there is no way of judging. It is certain, however, that the locations of Mount Adams and the main ridge were known. It is equally certain that the courses of the upper waters of the Klickitat and Pisco were *not* known—a thing which need excite no wonderment, since there are few topographical features less likely to be understood than the courses of these inferior streams and divides in a mountainous and broken country.

The result of these two certainties is to eliminate the Schwartz Ridge. Because that divide, by demonstration, was unknown to the treaty makers, and therefore could not have played any part whatever in the intention which they were seeking to express, it must be rejected for *all* purposes; to accept it for any, would be to top, deliberately, one error with another.

The only natural object corresponding with the fifth call of the description is evidently the blazed ridge extending from the fifty-first milepost of Schwartz westwardly to Mount Grayback and thence beyond the Klickitat River. The practical adoption of this ridge, as far west as Grayback, which was nearly contemporaneous with the treaty and long prior to the possibility of any controversy or dispute,

suffices to settle the south boundary as far as that mountain. From there Barnard ran his line to the "hump" on the east slope of Mount Adams. Here again is a resort to the early practical construction. It is objected to as arbitrary—particularly the straight line; and if the objection came from the Indians there would be reasons in its favor. They might very plausibly contend that the "hump" lies too far north to warrant its selection as a spur "south and east of Mount Adams," and that the boundary should be laid down the southeasterly slopes to connect with the westerly extension of the Grayback Ridge, and should follow that ridge east to the fifty-first milepost. This would have been greatly to their advantage, but it would not have assisted the defendants.

We agree with the lower courts that the Schwartz survey was very clearly erroneous and that the Barnard survey is objectionable only from the stand-point of the Indians.

It must not be forgotten that treaties with the Indians are always to be construed liberally in their favor in an endeavor to apply them as the Indians understood them. When this very treaty of 1855 was before it for construction, this court declared:

And we have said we will construe a treaty with the Indians as "that unlettered people" understood it, and "as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection," and counterpoise the ine-

quality "by the superior justice which looks only to the substance of the right without regard to technical rules." (119 U. S., 1; 175 U. S., 1.) How the treaty in question was understood may be gathered from the circumstances. (*United States v. Winans*, 198 U. S. 371, 380.)

The error was not merely the error of one who misjudged in weighing evidence; it was the error of one who, through ignorance, caprice, or what not, refused to hear or consider evidence. It was not the error of a judgment running counter to the weight of the evidence merely; it was the error of a judgment delivered in the face of all the evidence. Worse than this, it was an error brought about by a deliberate shutting of the eyes to the truth—by a conscious and deliberate refusal to inquire and judge, where inquiry and judgment were the plainest dictates of duty and, if fairly pursued and exercised, would have absolutely changed the result. Upon the facts as actually reported and admitted by Schwartz and Noel, their survey was erroneous and void as a matter of law. If they had performed the plain duty of examining the basis of the Indians' claim (which it is admitted they did not do), this error could only have become more palpable and clear.

For these reasons cases, like the Maxwell land grant case, in which this court was asked to reexamine disputed questions of fact which had been fairly examined and determined by the Land De-

partment, have, obviously, no application here. Furthermore, in the present case the survey has already been reexamined, found erroneous, and set aside by the department itself, and the act has been approved by Congress.

But it is argued that there are presumptions in favor of the older survey and presumptions attending the patents, and that the latter particularly are clothed with a pachydermous national dignity which is well-nigh impenetrable. We believe we appreciate the reasons which this court has so often assigned for protecting the Federal patents against light and ill-considered attacks. They are, first, that the patents are instruments of great solemnity; second, that the security of vast numbers of titles depends upon them; and, third, that their existence imports adjudication and finding by the Land Department of the facts which would authorize their issuance.

But the solemnity of a patent issued *ex parte* by the Land Department is certainly no greater than the solemnity of a treaty negotiated by a high official of the Government with a nation of Indians, approved by the President, ratified by the Senate, and promulgated by a solemn presidential proclamation. Indeed, the two things do not bear comparison. In point of importance and solemnity the first is relatively an insignificant thing. To hold that its effect is to rear up a presumption and a burden of proof sufficient to destroy the other, is to lose all sense of values in the estimation of governmental acts. Surely, the *vis inertiae* of the patents, due to this

solemn character, is offset in this case by the character of the opposing muniment—the treaty; surely, it is no less important to preserve a treaty than to preserve a patent.

As for the presumptions attending the patents, we fail to see how they can add anything to the presumption arising from the survey. The question of boundary was not involved in the patent proceedings. In those proceedings the correctness of the survey was assumed. The patents therefore do not evidence any adjudication concerning the boundary issue.

The presumption that the survey was correct was, of course, only *prima facie*. It was not merely overbalanced; it was actually destroyed by the evidence in the case. As soon as it became apparent that, in violation of their plain duty and of their written instructions, the surveyors had made no inquiry into the basis of the Indians' claim, and that, in gross misconception or disregard of the treaty, they had assumed it was their function at all hazards to avoid crossing the Klickitat River—as soon as this appeared, the foundation of the presumption collapsed.

This brings the case within the principle followed by this court in *Moffat v. United States* (112 U. S., 24), in which, however, the patents were attacked upon the ground of fraud and forgery. The court recognised the *prima facie* presumption attending the patent, but held that once it appeared that the register and receiver were guilty of dishonesty in the pro-

ceedings, so that the integrity of their official acts could not be relied upon, the presumption was swept away and no longer should be allowed any influence in determining the issues in the case. The court said, page 30:

The presumption as to the regularity of the proceedings which precede the issue of a patent of the United States for land is founded upon the theory that every officer charged with supervising any part of them, and acting under the obligation of his oath, will do his duty, and is indulged as a protection against collateral attacks of third parties. It may be admitted, as stated by counsel, that if upon any state of facts the patent might have been lawfully issued, the court will presume, as against such collateral attacks, that the facts existed; but that presumption has no place in a suit by the United States directly assailing the patent, and seeking its cancellation for fraud in the conduct of their officers. In such a suit the burden of proof is undoubtedly, in the first instance, on the Government to show a fatal irregularity or corrupt conduct on their part; but when a case is established which, if unexplained, would warrant a conclusion against them, the burden of proof is shifted, and they must show such integrity of conduct and such a compliance with the law as will sustain the patent. Its validity is, then, determinable, like any other controverted fact, upon the weight of evidence produced in support of and against their action.

II.

The defense of *bona fide* purchase.

This is an affirmative defense which must be strictly alleged. And the burden rests upon those who allege it to substantiate every allegation by strict proof. Thus in *Boone v. Chiles* (10 Pet., 177, 211) the court, with many citations of authorities which we here omit, expressed itself as follows:

The protection of such *bona fide* purchase is necessary only when the plaintiff has a prior equity, which can be barred or avoided only by the union of the legal title with an equity arising from the payment of the money and receiving the conveyance without notice and a clear conscience. It is setting up matter not in the bill; a new case is presented, not responsive to the bill, but one founded on a right and title operating, if made out, to bar and avoid the plaintiffs' equity, which must otherwise prevail. The answer setting it up is no evidence against the plaintiff, who is not bound to contradict or rebut it. It must be established affirmatively by the defendant independently of his oath. In setting it up by plea or answer, it must state the deed of purchase, the date, parties, and contents briefly; that the vendor was seized in fee, and in possession; the consideration must be stated, with a distinct averment that it was *bona fide* and truly paid, independently of the recital in the deed. Notice must be denied, previous to, and down to, the time of paying the money and the

delivery of the deed; and if notice is specially charged, the denial must be of all circumstances referred to from which notice can be inferred, and the answer or plea show how the grantor acquired title. The title purchased must be apparently perfect, good at law, a vested estate in fee simple. It must be by a regular conveyance; for the purchaser of an equitable title holds it subject to the equities upon it in the hands of the vendor and has no better standing in a court of equity. Such is the case which must be stated to give a defendant the benefit of an answer or plea of an innocent purchase without notice; the case stated must be made out; evidence will not be permitted to be given of any other matter not set out.

It was conceded by stipulation (R., 170) that certain specified tracts were purchased from the railway company by individual defendants "for value." But obviously this is not enough. Nothing was proved about notice or knowledge, nor was the amount of the consideration, the time of payment with reference to the conveyance, or the nature of the conveyance itself shown. For the railway company and the Mercantile Trust Co. a deposition was given (R., 305) by the general counsel of the former. We challenge its sufficiency upon the ground that the witness did not show himself qualified to prove the nonexistence of knowledge or notice; upon the ground that his evidence was based upon hearsay and mere assumption; and upon the ground that even

putting these criticisms aside, it fell far short of demonstrating with the requisite degree of certainty that either the railway company or the trust company was a purchaser for value and without notice. No one depending on this deposition could satisfy himself, for instance, that the make-up of the railway company was not such as to charge it with the same notice which its predecessor must, or at least may, have had. The consideration is not stated, nor the time of payment with reference to the alleged conveyance. The deposition shows actual notice in 1900 or 1901, before the issuance of some of the patents. The deponent testifies that a mortgage was given to the trust company and that certain bonds were issued and some sold. Nothing is said about notice to the trust company or bondholders, and we defy anyone to learn from the deposition whether or not either the mortgage or any of the bonds is still outstanding. In any event the mere existence of a mortgage could not bar relief in a case of this kind. (*Leavenworth, &c., R. Co. v. United States*, 92 U. S., 733, 753.) The mortgage might be, and without doubt is, amply secured on other property. A court of equity would marshal the security so as to save, if possible, such equities as are sought to be protected by this suit, if it recognized the mortgage at all.

Upon the whole we are disposed to believe that this defense has not been taken very seriously by the defendants' counsel, and that their lack of interest in it accounts for the practical failure of

the proofs. The reasons for this are not far to seek. The equity of a *bona fide* purchaser for value without notice will not prevail against a prior equal equity unless supported by the legal title. In this case the legal title is still held by the United States in trust for the Indians. The land had been set aside for the Indians by the supreme law of the land. The Land Department, therefore, was impotent to convey any part of it, and the issuance of the patents did not disturb the title. The patents were not merely voidable; they were absolutely void.

United States v. Winans, 198 U. S., 371.

Mullan v. United States, 118 U. S., 271.

United States v. Stone, 2 Wall., 525, 535.

Burfenning v. Chicago, St. Paul, &c., Railway Co., 163 U. S., 321.

In the *Winans* case this court was called upon to decide whether the fishery rights of the Yakima Indians, under article 3 of the treaty, *supra*, were destroyed by patents issued through the General Land Office and purporting to convey to the defendants absolute title to the land where the rights were exercised. The court held that the treaty gave the Indians rights in the land—the right to cross it to the river and the right to occupy it in the taking and curing of fish; that these rights were intended to be continuing rights against the United States and its grantees, and declared (p. 382):

The construction of the treaty disposes of certain subsidiary contentions of respondents. The Land Department could grant no exemptions from its provisions. It makes no differ-

ence, therefore, that the patents issued by the department are absolute in form. They are subject to the treaty as to the other laws of the land.

In the *Burfenning case, supra*, the court, after conceding the effect to be given to conclusions reached by the Land Department in matters within its jurisdiction, continued (p. 323):

But it is also equally true that when by act of Congress a tract of land has been reserved from homestead and preemption, or dedicated to any special purpose, proceedings in the Land Department in defiance of such reservation or dedication, although culminating in a patent, transfer no title, and may be challenged in an action at law. In other words, the action of the Land Department can not override the expressed will of Congress or convey away public lands in disregard or defiance thereof.

In *Morton v. Nebraska*, 21 Wall., 680 (reviewed and approved in the case last cited), the plaintiff held a patent, issued under the preemption act, for lands which were saline in character and noted as such on the field books, although the notes thereof had not been transferred to the register's general plats. That act declared that "no lands on which are situated any known salines or mines shall be liable to entry." It was held that the patent was absolutely void, the court saying (p. 674):

It does not strengthen the case of the plaintiffs that they obtained certificates of entry,

and that patents were subsequently issued on these certificates. It has been repeatedly decided by this court that patents for lands which have been previously granted, reserved from sale, or appropriated are void. The executive officers had no authority to issue a patent for the lands in controversy, because they were not subject to entry, having been previously reserved, and this want of power may be proved by a defendant in an action at law.

Apparently realizing this, opposing counsel fall back on the act of March 2, 1896 (29 Stat., 42, ch. 39) which provides, among other things:

But no patent to any lands held by a *bona fide* purchaser shall be vacated or annulled, but the right and title of such purchase is hereby confirmed.

This statute is part of the legislation for the adjustment of railway grants, beginning with the act of March 3, 1887 (24 Stat., 556, ch. 376), the purpose and meaning of which the court has considered upon a number of occasions.

The act of 1887 followed soon after the decision of this court in the case of *Kansas Pacific v. Dunmeyer* (113 U. S., 629), wherein it was held that lands to which homestead or preemption claims had attached prior to the filing of the railway company's map of location were excluded from its grant, and that no subsequent failure to perfect such claims, or abandonment thereof, could cause such lands to revert to the railway company. Prior to that time the Land De-

partment, in construing such grants, had long held that tracts so claimed would inure to the railway grantees upon failure or abandonment of the claims, and many such tracts had been patented or certified to the companies and in turn conveyed to persons who bought them in good faith, believing that the companies were the rightful owners. It was to remedy this situation that the acts of March 3, 1887, and March 2, 1896, *supra*, were passed.

United States v. Winona Co., 165 U. S., 463.

Wagstaff v. Collins (C. C. A., 8th Cir.), 97 Fed., 3.

In *Gertgens v. O'Connor* (191 U. S., 237, 242), speaking of the act of 1887, the court said:

We have more than once held that the entire statute was remedial in its nature and must be construed so as to carry out the intent of Congress and secure to the parties the intended relief. Primarily, the purpose was to secure an adjustment of the various land grants in aid of railroads. Much confusion had existed in the construction and administration of those grants. There had been conflicting decisions, and Congress attempted, *without displacing vested rights*, to do equity to all parties claiming interests in lands within these various grants. It did not purpose to merely define legal rights or prescribe new methods for their enforcement. The courts were competent under the law, as it stood, without additional legislation, to preserve such rights.

There were three parties whose interests and equities were to be regarded: First, the railway

company, the beneficiary of the grant; second, parties who had dealt with the railway company in reference to lands claimed by it to be within the scope of its grant; and, third, parties who had attempted to secure title under the settlement laws of the United States. With reference to the railway company, it is sufficient to say that Congress aimed to limit its acquisition of title to the amount of land which it had in fact earned by the construction of the road, and prescribed that the adjustment with it should be made in accordance with the rulings of this court; authorized actions to recover any lands improperly conveyed to the company, or, if the company had parted with them, the value thereof in money.

As to those who had dealt with the railway company, its evident purpose was to secure to them the lands they had contracted for, *in so far as it could be done without trespassing on the rights of settlers.*

The first section of the act of 1887 directed the Secretary of the Interior to adjust all railway grants, in accordance with the decisions of this court. The second directed proceedings to annul patents or certification of lands erroneously issued. The third gave protection and reinstatement to the original *bona fide* settlers under the homestead and preemption laws whose entries had been erroneously canceled by the Land Department in favor of the railroad companies; and provided that if such persons failed seasonably to renew their claims, the lands affected thereby should be disposed of under the public-land

laws "with priority of right to *bona fide* purchasers" thereof; that is, purchasers from the companies under the erroneous patents or certifications. (19 Op., 68.) And the fourth section gave to purchasers "in good faith" under such erroneous patents or certifications, of lands not claimed as aforesaid by original settlers or entrymen, opportunity to obtain patents running to themselves from the Government. We wish to point out distinctly that while the legislation was in large measure intended, as this court has said, "for the purpose of upholding the titles of parties who in good faith had purchased from railroad companies lands, which though supposed to be part of their grants, proved not to be so" (*United States v. Southern Pacific*, 184 U. S., 49, 52), nothing was farther from its intention than to sanction the displacement of existing rights, other than the technical right of the Government to recover the lands for itself. These laws expressly save the rights of original settlers and entrymen, subordinating to them the rights of purchasers under the erroneous and voidable patents, and they refer throughout only to lands which may be purchased and acquired under the general public land laws. In the *Winona case, supra*, the court said, page 481:

Our conclusion is that these acts operate to confirm the title to every purchaser from a railroad company of lands certified or patented to or for its benefit, notwithstanding any mere errors or irregularities in the proceedings of the Land Department, and notwithstanding the

fact that the lands so certified or patented were, by the true construction of the land grants, although within the limits of the grants, excepted from their operation, providing that he purchased in good faith, paid value for the lands, and *providing, also, that the lands were public lands in the statutory sense of the term and free from individual or other claims.*

In that opinion the court discussed also the limitation provisions of the acts of 1891 and 1896, respectively (set out *infra*), and as its words in that regard are particularly significant, we feel justified in quoting again (p. 475):

Congress evidently recognized the fact that notwithstanding any error in certification or patent there might be rights which equitably deserved protection, and that it would not be fitting for the Government to insist upon the letter of the law in disregard of such equitable rights. In the first place, it has distinctly recognized the fact that *when there are no adverse individual rights, and only the claims of the Government and of the present holder of the title to be considered*, it is fitting that a time should come when no mere errors or irregularities on the part of the officers of the Land Department should be open for consideration. In other words, it has recognized that, *as against itself* in respect to these land transactions, it is right that there should be a statute of limitations; that when its proper officers, acting in the ordinary course of their duties, have conveyed away lands which belonged to the Government such conveyances should, after the lapse of a

prescribed time, be conclusive against the Government, and this notwithstanding any errors, irregularities, or improper action of its officers therein.

Thus, in the act of 1891, it provided that suits to vacate and annul patents theretofore issued should only be brought within five years, and that as to patents thereafter to be issued such suits should only be brought within six years after the date of issue. Under the benign influence of this statute it would matter not what the mistake or error of the Land Department was, what the frauds and misrepresentations of the patentee were, the patent would become conclusive as a transfer of the title, *providing only that the land was public land of the United States and open to sale and conveyance through the Land Department.* The act of 1896 extended the time for the bringing of suits for patents theretofore issued for five years from the passage of that act.

The opinion continues (pp. 476, 477):

But limitation was not the only protection given. The act of 1896, which extended the period of limitation, followed such extension with this provision: "But no patent to any lands held by a *bona fide* purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed." * * * We are of the opinion that Congress intended by the sentence we have quoted from the act of 1896 to confirm the title which in this case passed by certification to the State. It not only declares that no patents to any lands held by a *bona fide* purchaser shall be

vacated or annulled, but it confirms the right and title of such purchasers. Given a *bona fide* purchaser, his right and title is confirmed, and no suit can be maintained at the instance of the Government to disturb it.

In another case against the same company (165 U. S., 483), where it appeared that the original pre-emptioner maintained his possession and filing until after the land had been deeded by the railway company, it was held that the purchaser from the company was charged with notice by the preemptioner's possession, and was therefore not protected as a *bona fide* purchaser by the acts of 1887 and 1896. The court said (p. 486):

Such a purchaser can not claim to be one in good faith if he has notice of facts outside the records of the Land Department disclosing a prior right. The protection goes only to matters anterior to the certification and patent. The statute was not intended to cut off the rights of parties continuing after the certification, and of which at the time of his purchase the purchaser had notice. Only the purely technical claims of the Government were waived.

Plainly, none of the defendants can even plausibly pretend to be a *bona fide* purchaser in the peculiar sense of those enactments. Not only were they put on notice of the treaty, but they dealt concerning lands the patenting of which either to a railway company or to individuals was never authorized or intended by Congress, and which could not be pat-

ented to them without destroying rights already existing.

Finally, the claim of the trust company is disposed of by the first *proviso* of section 4 of the act of 1887, declaring that no mortgage or pledge of lands by a railway grantee shall be considered as a sale.

III.

Statute of limitations.

Before we come to consider the true application of this statute let us dwell for a brief space upon the nature of the equitable rights which it is invoked to destroy. In return for a vast cession, this Government by a solemn treaty agreed to reserve, set apart, and, so far as necessary, survey and mark out, the land in controversy, for the occupation and "exclusive use and benefit" of the Indians. "Nor," it said, "shall any white man, excepting those in the employment of the Indian Department, be permitted to reside upon the said reservation without permission of the tribe and the superintendent and agent." Also, by article 6, it held out the hope, if it did not actually promise, that in course of time allotments in severalty would be made of the reserved land to individuals and families for their permanent homes. Granted, for the sake of argument only, that there was in these assurances no potency to preserve them against the subsequent perfidy of the Government, should it choose to act perfidiously toward those who had confided in its honor, does not the possession of the power of

oppression afford in itself the very strongest reason why the Government, and especially its courts of justice, should strain to avoid the odium of exercising the power? In *Leavenworth &c. R. Co. v. United States* (92 U. S., 733, 742) this court reaffirmed its previous declarations that—

“The Indians are acknowledged to have the unquestionable right to the lands they occupy, until it shall be extinguished by a voluntary cession to the Government,” and declaring that right “to be as sacred as the title of the United States to the fee.”

It said (p. 746):

That lands dedicated to the use of the Indians should upon every principle of natural right be carefully guarded by the Government and saved from a possible grant is a proposition which will command universal assent.

In *Minnesota v. Hitchcock* (185 U. S., 373, 389) it was held that—

The Indians’ right of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then upon such consideration as shall be agreed upon.

If this be true of the Indians’ right of occupancy, unfortified by the promise and faith of the Nation plighted in a written treaty and founded upon a valuable consideration, how much more sacred and compelling does the right become when the promise and the plighted faith are added to its support.

It was necessary, especially in the beginnings of our national history, to hold that surrender by the Indians might be lawfully compelled. To concede them the right to impose their own terms would not have consisted with the national destiny or the fundamental relations between a dominant sovereignty and a conquered people. But this qualification of right is present only when those relations are present—between the Indians and the Government. What the Government has yielded to them is *theirs*—absolutely theirs—until the Government itself shall see fit to assume it with their consent or deprive them of it by compulsion. In this case we are not required to consider the question whether the equity of the Indians had passed within the protection of the Constitution; for in so far as third parties are concerned, it was just as perfect and impregnable as any constitutionally vested right, and in so far as the Government is concerned, the equity was protected by all the intempts and presumptions which distinguish right from wrong. As against the claims and pretensions of these defendants, the Indians are in no worse position than they would be if it were conceded that the Government had granted them an equitable estate. They are indeed in a better position than would be occupied by white men to whom the Government had conveyed the entire beneficial ownership, retaining in itself the bare legal title; for the Indians, not having the capacity to protect their right, are free from any possible imputation of laches.

Section 8 of the act of March 3, 1891, "An act to repeal timber-culture laws and for other purposes," as amended by another act of the same date, provided among other things:

That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents. (Ch. 561, 26 Stat., 1095, 1099.)

The act of March 2, 1896 (ch. 39, 29 Stat., 42), enacted, *inter alia*:

That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents and the limitation of section 8 [of the act of 1891, *supra*] and amendments thereto is extended accordingly as to the patents herein referred to. But no patent to any lands held by a *bona fide* purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed.

The act of 1891 is a lengthy statute, having distinctively to do with the disposition of "public lands"—that is, lands owned by the United States and subject to sale or other disposition under general

laws, and, of course, not already dedicated to others. Congress was careful to provide in its tenth section:

That nothing in this act shall change, repeal, or modify any agreements or treaties made with any Indian tribes for the disposal of their lands, or of land ceded to the United States to be disposed of for the benefit of such tribes. (26 Stat., 1099.)

We have already pointed out that the act of 1896 was part of the legislation for the adjustment of railway grants. In both acts, Congress was legislating concerning public lands owned absolutely by the United States and subject to private acquisition under its dispositive laws. There is no reason for supposing an intention to cripple the power of the Government to set aside patents which, through error, and without authority or jurisdiction in the Land Department, might be issued for lands which, by express direction of a law enacted by Congress itself, or of a treaty concluded by the President and Senate, had already been set aside and permanently reserved for public uses or for the benefit of Indian tribes. The implication is directly to the contrary, and the general terms of the statutes must be restrained accordingly in avoidance of such absurd and dangerous results. When it is considered that patents flow forth from the General Land Office in multitudes, that many if not most of them are approved upon the recommendation of subordinate officials, and that the statute of limitation, when it applies, operates not merely to bar the remedy, but also to confirm the title which the patents purport

to convey (*United States v. Chandler-Dunbar Co.*, 209 U. S., 447), the improbability that Congress could have intended such an application here becomes manifest.

In the *Winona Company's case*, first *supra*, this court, foreseeing the danger of the contrary view, was careful to speak of these statutes as applicable only when the attack is made by the United States for its own benefit and in respect of lands grantable under the public-land laws. And in the *Chandler-Dunbar case*, Mr. Justice Holmes, citing that part of the opinion in the *Winona case*, took pains to point out that the land involved in the case before him "was public land of the United States and in kind open to sale and conveyance through the Land Department." In the opinion of the Circuit Court of Appeals it is said of the limitation:

Doubtless this would not extend to lands reserved by treaty, and probably not to lands which had at the date of the statute been taken out of its power of disposition in favor of other parties who had acquired contingent interests therein, though the prospective part of the statute, not quoted above, might perhaps cover such lands if they should fall back into its absolute control. *United States v. Chandler-Dunbar Co.*, 152 Fed., 25, 29.

It is true that in that case the patent was claimed to be void because the land, many years before the patent, had been reserved by the President in anticipation of possible public uses. But no public use had, in fact, been made of it, and the reasons for the reser-

vation itself had come to amount to a mere technicality, surviving unnoticed in the records of the department. The case was clearly one which fell within the spirit of the statute, and one which offered no convincing appeal to a court of chancery.

The distinction between that case and the case at bar is too obvious for comment. Applied to this case the limitation, far from dispensing a "benign influence," would consume with a monstrous injustice and breach of faith. In *Leavenworth, etc., Railroad Co. v. United States* (92 U. S., 733) this court held that, as a transfer of any part of an Indian reservation secured by a treaty would involve a gross breach of the public faith, the presumption was conclusive that Congress never meant to grant it. It reaffirmed the doctrine announced in *Wilcox v. Jackson* (13 Pet., 398) (involving a military reservation), where it was held that wherever a tract of land has been once appropriated for any legal purpose, from that moment the land so appropriated becomes severed from the mass of public lands, and that no subsequent law, proclamation, or act of Congress, should be construed to operate upon it, and said, that the rule there announced applied with even more force to Indian than to military reservations, since the latter were the absolute property of the Government, while the former were subject to the rights of the Indians; and that Congress could not be supposed to grant them by a subsequent law, general in its terms, in the absence of specific language leaving no room for doubt of the legislative will to do so.

The statute of limitations should receive a strict construction. Its general terms should not be permitted, upon the theory that they operate to create a grant, to sweep away the rights of these helpless Indians any more readily than should the general terms of a granting act, such as was involved in the *Leavenworth Company's case*.

We notice in the opposing brief (pp. 50, 51) an attempt to differentiate between "the Government's own right to the fee" and the interest which it holds for the Indians. If in sound theory such a distinction were allowable, and if it were held that the defendants have succeeded to the Government's title, it would thereupon become the duty of the court to order a decree upholding the patents but adjudging that the lands shall be held in trust and subject to the right of perpetual use and occupation which the treaty in effect guarantees to the Indians. But such a distinction would be absurd. Private persons and railway corporations could not succeed to the relations which the treaty established between the Indians and the United States. The Government did not retain the fee for itself presumably. On the contrary, it must be presumed that Congress intended to make use of it ultimately for the Indians' benefit. Their rights therefore involve the fee as well as the possession.

United States v. California and Oregon Land Company (192 U. S., 355) seems to be cited in the defendants' brief as authority for the general proposition

that lands which the United States holds for the Indians will be affected by the same laws and presumptions as lands which it holds for itself.

In that case it was held that the United States, having once sued unsuccessfully to annul certain patents upon the ground that the wagon-road grant under which they were issued was forfeited, was estopped by the decree to sue again to annul some of the same patents upon the ground that they improperly included lands belonging to an Indian reservation. The relief sought was the same in both cases. The parties were the same. The only difference lay in the reasons assigned for the relief. The majority of the court decided that the distinction of reasons did not amount to a distinction of causes of action. The United States was regarded as the owner of the fee, and the interest of the Indians was identified with the interest of the United States for the purposes of litigation. It did not appear in that case, as it does in this, that by act of Congress the full beneficial ownership had been in effect transferred to the Indians before the suit was brought, and the case might plausibly be distinguished on that ground. But the obvious ground of distinction is, that in our case we have to do with the question whether Congress intended certain laws designed to place restrictions upon the right of the Government to recover public lands to apply in respect of lands belonging to Indian reservations. The distinction

between these two classes of lands plainly and necessarily exists, with corresponding reasons for distinctions in the applications of the acts of Congress, whether there be or be not distinctions under the general principles of law in the status of the United States as a party in court when it seeks to recover the one and when it seeks to recover the other class of land.

Whether the act concerning *bona fide* purchasers, or the statute of limitations, is applicable in such a case as this depends upon the express or implied intention of Congress.

The decree should be affirmed.

ERNEST KNAEBEL,
Assistant Attorney General.
S. W. WILLIAMS,
Of Counsel.

APPENDIX.

**Field notes of the survey of the Yakama Reservation,
in the Territory of Washington, by Thomas F.
Berry and James Lodge, United States deputy sur-
veyors, under their contract with William W. Miller,
superintendent of Indian affairs for Territory of
Washington, dated September 9, A. D. 1861.**

[Survey made in 1861.]

NOTE.—The south boundary only was surveyed, in accordance with the instructions of the superintendent. The other boundaries are defined naturally.

Commenced, Monday 30th Sept., 1861, at the mouth of the Sataes River on the right bank of the Yakama River, with variation 21 degrees E.

Thence—

S. 19 degrees W., 76.00 chains.

S. 11 degrees W., 30.00 chains.

S. 28 degrees E., 20.10 chains.

S. 86 $\frac{1}{2}$ E., 12.50 chains.

S. 65 $\frac{1}{2}$ degrees E., 72.50 chains.

East, 34.00 chains.

S. 61 $\frac{1}{2}$ degrees E., 111.50 chains.

S. 68 $\frac{1}{2}$ degrees E., 111.00 chains.

S. 87 $\frac{1}{2}$ E., 172.40 chains to a point S. 26 $\frac{1}{2}$ W. 39.50 chains of bank of Yakama River.

Set post on right bank of the Yakama River; made mound with trench and pits as per instructions.

Thence S. 26 $\frac{1}{2}$ degrees W.

80.00 Set post in mound with trench and pits.

160.00 Set post in mound with trench and pits.

240.00 Set post in mound with trench and pits.

320.00 Set post in mound with trench and pits.

400.00 Set post in mound with trench and pits.

480.00 Set post in mound with trench and pits.

560.00 Set post in mound with trench and pits.

640.00 Set post in mound with trench and pits.

720.00 Set post in mound with trench and pits.

800.00 Set post in mound with trench and pits.

Thence S. 82 degrees W.

80.00 Set post in mound with trench and pits.

Thence S. 53 degrees W.

80.00 Set post in mound with trench and pits.

160.00 Set post in mound with trench and pits.

Thence S. 77 degrees W.

80.00 Set post in mound with trench and pits.

160.00 Set post in mound with trench and pits.

Thence S. 76 degrees W.

80.00 Set post, made mound with trench and pits.

Thence S. 74 degrees 30' W.

80.00 Set post in mound with trench and pits.

160.00 Set post in mound with trench and pits.

Thence N. 82 degrees W.

80.00 Set post in mound with trench and pits.

Thence S. 65 degrees W.

45.00 Set post in mound of stone.

Thence N. 85 degrees W.

71.00 Set post in mound with trench and pits.

Thence S. 60 degrees W.

30.00 Set post in mound of stone.

Thence N. 85 degrees W.

51.00 Set post in mound of stone.

Thence S. 33 degrees 30 minutes W.

55.00 Set post in mound of stone.

Thence N. 89 degrees W.

80.00 Set post in mound of stone.

Thence S. 71 degrees W.

80.00 Set post in mound of stone.

Thence S. 38 degrees 30 minutes W.

28.50 Set post in mound of stone.

Thence S. 71 degrees 30 minutes W.

49.00 Set post in mound of stone.

Thence N. 83 degrees 30 minutes W.

50.00 Set post in mound of stone.

Thence S. 45 degrees W.

40.00 Set post in mound of stone.

Thence N. 76 $\frac{1}{2}$ degrees W.

30.00 Set post in mound with trench and pits.

Thence N. 82 degrees 30' W.

73.00 Set post in mound of stone.

Thence S. 68 degrees 30' W.

30.50 Set post in mound of stone. Timber pine.

Thence N. 75 degrees W.

52.00 Set post in mound of stone.

Thence S. 30 degrees W.

30.00 Set post in mound of stone. Open pine woods.

65.00 To camp in gulch; set post from which a pine 25 inches thro' bears N. 67 degrees W. 37 links; a pine 30 inches thro' bears S. 57 degrees E. 92 links.

Thence S. 5 degrees 30' W.

52.50 Set post in mound with trench and pits.

Thence S. 65 $\frac{1}{2}$ degrees W.

23.50 Set post in mound of stone.

Thence S. 82 $\frac{1}{2}$ degrees W.

50.00 Set post in mound of stone. Open pine woods.

Thence S. 65 degrees W.

50.00 Set post in mound of stone.

Thence S. 83 degrees W.

60.50 Set post in mound of stone. Open pine woods.

Thence N. 73 degrees W.

80.00 Set post in mound with trench and pits. Open pine woods.

Thence S. $75\frac{1}{2}$ degrees W.

38.00 Set post in mound of stone. Open pine woods.

Thence N. 84 degrees W.

39.00 Set post in mound of stone. Open pine woods.

Thence N. $86\frac{1}{2}$ W.

40.00 Set post from which a pine 25 inches thro' bears S. 35 degrees W. 85 links; a white fir 20 inches thro' bears N. 74 degrees E. 120 links.

Thence N. $71\frac{1}{2}$ degrees W.

41.00 Set post in mound of stone; pine timber.

Thence S. $85\frac{1}{2}$ degrees W.

42.00 Set post in mound of stone; pine timber.

Thence S. 31 degrees W.

43.00 Set post in mound of stone.

Thence S. 55 degrees W.

44.00 Set post in mound with trench and pits. Open pine woods.

Thence S. 76 degrees W.

45.50 Set post in mound of stone; no timber.

Thence S. $39\frac{1}{2}$ degrees W.

46.00 Set post in mound of stone. Open pine woods.

Thence N. 85 degrees W.

47.50 Set post in mound of stone.

Thence N. $35\frac{1}{2}$ degrees W.

48.00 Set post in mound of stone.

Thence N. 84 degrees W.

49.50 Set post in mound with trench and pits. Oak and pine timber.

Thence N. 40 degrees W.

50.00 To Canon Road from Fort Simcoe to the town of Dallas, bears N. and S.

51.50 Marked a pine 18 inches thro' for a corner from which a pine 16 inches thro' bears S. 30 degrees W. 19 links; an oak, 8 inches thro', bears N. 80 degrees E. 12 links.

Thence N. 51 degrees W.

39.00 Set post in mound of stone. Open pine and oak woods.

Thence N. 83 degrees W.

23.00 Set post in mound of stone. Open pine & oak woods.

Thence N. 53 degrees W.

25.00 Set post in mound of stone.

Thence N. 74 degrees 30' W.

30.00 Set post in mound of stone.

160.00 Set post from which a pine, 10 inches thro', bears S. 6 degrees W. 5 links; a fir, 12 inches thro', bears N. 5 degrees E. 24 links. Open pine and fir timber.

340.00 Set post in mound of stone.

Thence S. 87 degrees W.

76.00 Set post in mound of stone.

Thence S. 59 $\frac{1}{2}$ degrees W.

42.00 Set post, with mound and trench and pits. Open pine woods.

Thence N. 52 $\frac{1}{2}$ degrees W.

39.00 Set post in mound, with trench and pits.

Thence S. 70 degrees W.

26.00 Set post in mound of stone.

Thence N. 70 degrees W.

62.00 Set post in mound of stone.

Thence west.

55.00 Set post in mound, with trench and pits.

Thence N. 60 $\frac{1}{2}$ degrees W.

23.00 Set post in mound, with trench and pits.

Thence S. 85 degrees W.

28.50 Set post in mound, with trench and pits.

Thence S. 25 degrees W.

90.00 degrees. Set post in mound with trench and pits.

Thence N. 70 degrees W.

70.50 Set post in mound with trench and pits.

6
9

Thence N. 55 degrees E.

23.00 Set post in mound with trench and pits.

Thence N. 51 degrees W.

55.00 Set post in mound with trench and pits.

Thence north.

30.00 Set post in mound with trench and pits. Pine and fir timber.

Thence N. 22 degrees 30 minutes W.

53.25 To military road from Fort Simcoe to the town of Dallas, and set post in mound with trench and pits.

Thence N. 5 degrees E.

63.50 Set post in mound with trench and pits.

Thence N. 80 degrees W.

75.00 Set post in mound of stone.

Thence N. 80 $\frac{1}{2}$ degrees W.

80.00 Set post in mound with trench and pits.

106.00 Set post in mound of stone.

Thence S. 49 $\frac{1}{2}$ degrees W.

60.00 Set post in mound with trench and pits.

Thence S. 71 degrees W.

34.00 To road from Fort Simcoe to town of Dallas bears N. and S.

80.00 Set post in mound with trench and pits.

Thence S. 89 degrees W.

56.50 Set post in mound with trench and pits.

Thence S. 48 degrees W.

30.00 Set post in mound with trench and pits.

Thence N. 83 degrees W.

80.00 Set post in mound with trench and pits.

123.00 Set post in mound with trench and pits.

Thence S. 78 $\frac{1}{2}$ degrees W.

60.50 Set post in mound with trench and pits.

Thence S. 63 $\frac{1}{2}$ W.

11.00 Set post in mound with trench and pits.

Thence N. 75 degrees W.

11.00 Set post in mound with trench and pits.

Thence S. 70 degrees W.

11.00 Set post in mound with trench and pits.

Thence N. 89 degrees W.

11.50 Set post in mound with trench and pits.

Thence N. 49 degrees W.

11.00 Set post in mound with trench and pits.

Thence N. 76 degrees W.

11.50 Set post in mound of stone.

Thence S. 75 degrees W.

11.50 Set post in mound with trench and pits.

Thence S. 26 degrees W.

11.85 Set post in mound with trench and pits 10.00 chains east of a bald butte (the foot of the butte) and close the survey.

[Recapitulation omitted.]

GENERAL REMARKS.

The above survey was made with Burts improved solar compass. The variations are from 21 degrees to 21 $\frac{1}{2}$ degrees east. The posts are all numbered; commenced with the post on the right bank of the Yakima River (the right bank, when looking downstream) as No. 1.

THOMAS F. BERRY,
JAMES LODGE,
Surveyors.